UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NO. 36399

LEWIS V. SMITH and CLEO SMITH, his wife,
Plaintiffs,

vs.

ELIZABETH ANN PETERS,
Defendant.

COMPLAINT

Now comes Lewis V. Smith and Cleo Smith, his wife, by their attorneys, D'Avanzo and Danko, and for their cause of action, say:

COUNT I

1. Plaintiffs Lewis V. Smith and Cleo Smith, his wife, are residents of the State of Michigan and defendant, Elizabeth Ann Peters is a resident of the State of Kentucky. Further that the amount in contraversy exceed Ten Thousand ($10,000.00) Dollars.

2. On May 3, 1970 at approximately 3:50 P.M., plaintiff, Cleo Smith, was a passenger in a 1966 Pontiac automobile bearing 1970 Michigan License Plate No. KYR 798, which vehicle was owned and driven by plaintiff, Lewis V. Smith, in a northerly direction on US 25 in the City of Londan, Kentucky.

3. At the aforesaid time and place, defendant, Elizabeth Ann Peters, was the owner and operator of a 1963 Volvo automobile bearing 1970 Kentucky license plate No. 504 602, which was being driven by her in a northerly direction on US 25 in the City of London, Kentucky, in a careless, reckless and negligent manner.

4. At the aforesaid time and place, defendant drove her vehicle into the rear of plaintiff's automobile which had stopped on the said highway because of traffic having stopped in front of her, thereby causing extreme damage to plaintiff's automobile and severe and personal injuries to plaintiff as hereinafter set forth.

5. That notwithstanding the duties and obligations imposed upon the defendant herein by the statutes of the State of Kentucky, local laws the the rules of common law, defendant omitted and neglected to obey and observe said duties applicable to the operation of motor vehicles in the following particulars:

(a) Driving upon the said highway carelessly and heedlessly, in willful and wanton disregard to the rights or safety of other, and without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger plaintiff.

(b) Failing to drive upon the said highway at a careful and prudent speed not greater than nor less than was reasonable and proper having due regard to the traffic, surface and width of the highway and of any other conditions then and there existing, and driving upon the said highway at a speed greater than would permit the vehicle to be brought to a stop within the assured clear distance ahead.

(c) In following plaintiff's vehicle more closely than was reasonable and prudent, having due regard for the

speed of her vehicle and the traffic upon and the condition of the highway.

(d) In failing to make proper observation of existing conditions and control and striking the rear of plaintiff's vehicle while it was lawfully stopped upon the highway.

6. As a direct and proximate result of the aforesaid negligent acts and omissions by defendant, plaintiff was suddenly and violently thrown about and against the interior of her automobile with such force that she sustained severe injuries to her neck, shoulders and back, all of which caused excruciating pain and suffering and injury.

7. By reason of the said injuries and the sequelae thereof, plaintiff has been subjected to severe and continued body and head pains and require continual medical treatment. Further, that said injuries have prevented plaintiff from pursuing and performing her ordinary activities, household duties and occupation for long periods of time at great loss of income and because of the permanent nature of said injuries, plaintiff will in the future endure paid and suffering, require medical attention and be restricted in her normal pursuits, activities and occupation, all at great personal loss and discomfiture.

WHEREFORE, plaintiff, Cleo Smith, prays for Judgment against the defendant, Elizabeth Ann Peters, in the amount of Thirty Five Thousand ($35,000.00) Dollars, plus interest, costs and attorney fees.

COUNT II

8. Plaintiff Lewis V. Smith, incorporates by express reference each and every of the allegations contained in Count I.

9. By reason of the injuries sustained by his wife, Cleo Smith, plaintiff has been required to expend large sums of money for medical and hospital treatment and will in the future by required to expend additional monies for such case and treatment because of the permanent nature of the injuries sustained by his wife. Further, plaintiff has been deprived of the services of his wife for long periods of time and will in the future sustain the loss of such services all at great personal loss and inconvenience.

WHEREFORE, plaintiff, Lewis V. Smith, prays for Judgment against the defendant, Elizabeth Ann Peters, in the amount of Fifteen Thousand ($15,000.00) Dollars, plus interest, costs and attorney fees.

/s/ STEPHEN G. DANKO
D'Avanzo and Danko
By: Stephen G. Danko
Attorneys for Plaintiffs
12154 Dix-Toledo Road
Southgate, Michigan 48195
Av. 2-1611

STATE OF MICHIGAN
IN THE UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT

Case No. 36399

LOUIS V. SMITH and CLEO SMITH, his wife,
Plaintiffs,

vs.

ELIZABETH ANN PETERS,
Defendant.

MOTION TO DISMISS

Now comes the above named defendant by attorneys Eggenberger, Eggenberger, McKinney & Weber and pursuant to rule 12 (B) (2) move this honorable court for an order to dismiss this action for lack of jurisdiction, and in support of such motion, says:

1. That the accident of which this cause of action arises occurred in the state of Kentucky.

2. That defendant Elizabeth Ann Peters is a resident of the state of Kentucky.

3. That service of process was purported to be made upon the defendant in the state of Kentucky as more fully appears in the return of service filed with the court.

This motion is based upon the files of this court and cause, the return of service previous filed, and the affidavit

of John P. McKinney attached hereto and made a part hereof.

EGGENBERGER, EGGENBERGER,
McKINNEY & WEBER

BY /s/ JOHN P. McKINNEY
Attorneys for defendant
1600 Guardian Building
Detroit, Michigan 48226
961-9722

Dated: May 17, 1971
JPM:ch

AFFIDAVIT

STATE OF MICHIGAN)
) SS
COUNTY OF WAYNE)

JOHN P. McKINNEY, being first duly sworn, deposes and says that he is an attorney licensed to practice law in the State of Michigan and duly associated with Eggenberger, Eggenberger, McKinney & Weber, attorneys for defendant in the above entitled cause; that he prepared and read the attached motion to dismiss and that same is true of his own knowledge and belief.

Further deponent saith not.

/s/ JOHN P. McKINNEY

Subscribed and sworn to before me
on this 17th day of May, 1971

/s/ KATHLEEN E. BASSFORD
KATHLEEN E. BASSFORD, Notary Public
County of Wayne, State of Michigan
My Commission Expires: January 13, 1973.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 36399

LEWIS V. SMITH and CLEO SMITH, his wife,
Plaintiffs,

vs.

ELIZABETH ANN PETERS,
Defendant.

PLAINTIFFS' ANSWER IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND PLAINTIFFS' MOTION FOR CHANGE OF VENUE

Now comes Lewis V. Smith and Cleo Smith, his wife, plaintiffs in the above entitled cause by their attorneys, D'Avanzo and Danko, and for their answer in opposition to defendant's motion to dismiss and for their motion for change of venue state as follows:

1. That proper venue in this cause lies in the State of Michigan where all plaintiffs reside and in the State of Kentucky where defendant resides and where the cause of action occurred.

2. That to dismiss plaintiffs' cause of action would result in a serious injustice to plaintiffs' case in that the statute of limitations for the State of Kentucky, being one (1) year, has ran as of May 3, 1971.

3. That a change of venue to the State of Kentucky is proper under 28 U.S.C. Section 1404 (a).

WHEREFORE, plaintiffs pray that defendant's motion to dismiss be denied and that this case be transferred to the District Court for the State of Kentucky.

D'AVANZO AND DANKO
By: /s/ STEPHEN G. DANKO
Attorneys for Plaintiffs
12154 Dix-Toledo Road
Southgate, Michigan 48195
Av. 2-1611

Dated: June 15, 1971

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 36399

LEWIS V. SMITH and CLEO SMITH, his wife,
Plaintiffs,

vs.

ELIZABETH ANN PETERS,
Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION AND GRANTING PLAINTIFFS' MOTION TO TRANSFER TO THE FEDERAL DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

At a session of said Court held in the Courthouse in the City of Detroit, Eastern District of Michigan, Southern Division, on June 29, 1971.

PRESENT: Hon. Damon J. Keith, United States District Judge.

This cause having come on to be heard upon the Motion of defendant to dismiss for lack of personal jurisdiction, the plaintiff having replied to said Motion and filed a Motion to transfer said cause, the Court being fully advised in the premises and after argument of counsel:

IT IS HEREBY ORDERED that defendant's motion to dismiss for lack of personal jurisdiction be denied.

IT IS HEREBY ORDERED that in the interest of justice, this cause be, and the same is hereby, transfered to the Federal District Court for the Eastern District of Kentucky, London Division, for further proceedings.

DAMON J. KEITH
United States District Judge

Approved:

EGGENBERGER, EGGENBERGER,
McKINNEY & WEBER

By: /s/ JOHN P. McKINNEY
Attorney for Defendant

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION

Civil Action No. 1986

LEWIS V. SMITH and CLEO SMITH,
Plaintiffs,

vs.

ELIZABETH ANN PETERS,
Defendant.

MOTION

Comes now the defendant, by counsel, and moves the Court to quash the return of process served on the defendant herein on August 10, 1971, for the following reasons:

(1) The action was not commenced in good faith as required by the laws of the Commonwealth of Kentucky, because the instant action was filed in the District Court of the United States for the Southern District of Michigan, and thereafter transferred to this Court, and this Court is without jurisdiction to issue process for the commencement of an action under the laws of Kentucky on transfer of a case from another district outside Kentucky to this district.

(2) The Kentucky Statute of Limitations had expired before the issuance of the summons herein, dated August 3, 1971, and the plaintiff's action is now barred by reason thereof.

Upon this Motion the defendant demands judgment of the Court.

HAMM, TAYLOR, MILBY & FARMER
P.O. Drawer "A"
London, Kentucky 40741
By: /s/ BOYD F. TAYLOR
Attorneys for Defendant

NOTICE OF HEARING:

Notice is hereby given that the foregoing Motion will be heard at such a time and place as may be designated by the Court.

/s/ BOYD F. TAYLOR
Of Counsel for the Defendant

CERTIFICATE:

The undersigned certifies that the foregoing Motion was served upon the plaintiff by mailing a true copy thereof to Hon. C. R. Luker, 108 East Fourth Street, London, Kentucky 40741, and D'Avanzo and Danko, 12154 Dix-Toledo Road, Southgate, Michigan 48195, on this 20th day of August, 1971.

/s/ BOYD F. TAYLOR
Of Counsel for the Defendant

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON

NO. 1986

LEWIS V. SMITH, ET AL,

Plaintiffs,

vs.

ELIZABETH ANN PETERS,

Defendant.

MEMORANDUM OPINION

(Filed May 24, 1972)

On April 23, 1971, the plaintiffs filed, in the United States District Court for the Eastern District of Michigan, a complaint in which they allege that they are "residents" of the State of Michigan, that the defendant is a "resident" of the State of Kentucky, that the amount in controversy "exceed Ten Thousand Dollars ($10,000.00)" and that the plaintiffs' damages arise from an automobile accident which occurred in Laurel County, Kentucky on May 3, 1970, as a result of the negligent operation of an automobile by the defendant. Process was issued by the Michigan Court and was served on the defendant, in Kentucky, on April 28, 1971. The defendant promptly filed a motion to dismiss for lack of jurisdiction. The plaintiffs responded with a motion to transfer the action to this Court. The plaintiffs' motion was sustained and, on

June 29, 1971, the action was transferred by an order which fails to recite its statutory basis and which states only that such transfer is "in the interest of justice." Following the transfer of the action, the plaintiffs caused process to be issued, on August 3, 1971, by this Court, which process was served on the defendant on August 10, 1971. The defendant has renewed her motion to dismiss and has filed motions seeking to quash the return of the process issued by the Michigan Court and by this Court. The defendant is contending that the service of the process of the Michigan Court should be quashed because there was no authority for such extraterritorial service, that the action should be dismissed because of the manifest defects in the plaintiffs' jurisdictional allegations, that the transfer of the action was improper and that the action is barred because of the running of the Statute of Limitations. The plaintiffs are contending that the transfer of the action was proper, that the commencement of the action in Michigan was sufficient compliance with the Statute of Limitations and that their defective jurisdictional allegatons can be cured by amendment to their complaint.

Under the provisions of 28 U.S.C. 1653, defective jurisdictional allegations may be amended "upon terms, in the trial or appellate courts." By virtue of said provisions, such defective allegations do not require the dismissal of the action, and it has been specifically held that curative amendments may be supplied following the running of the pertinent limitation period. *Carwile* v. *Public Service Company of Indiana, Inc.*, 315 F.2d 301. Further, cases such as *Taylor* v. *Love*, 415 F.2d 1118 (6th Cir. 1969), make it abundantly clear that under the provisions of 28 U.S.C. 1406 (a) a district court may transfer an action based upon diversity of citizenship even though the court does not have jurisdiction over the person of the defendant

and even though the action may have been brought in the transferring district solely to avoid the running of the applicable Statute of Limitations.

Granting, however, that the plaintiffs' defective jurisdictional allegations are curable by amendment and that the United States District Court for the Eastern District of Michigan had the power to transfer the action to this Court, under the now axiomatic doctrine of *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 65 (1938), this Court is obliged to decide all outcome determinative questions as the Kentucky Court of Appeals would direct a Kentucky Circuit Court which had received an identical case in an identical position.

KRS 413.140 (1) (a) provides that an action for injury "to the person of the plaintiff, or of his wife, child, ward, apprentice, or servant" shall be commenced within one year after the cause of action occurred. The commencement of an action is defined in KRS 413.250, which provides:

> An action shall be deemed to commence on the date of the first summons or process issued in good faith from the court having jurisdiction of the cause of action.

An exception to the rule of KRS 413.250 is created by the language of KRS 413.270 (1), which reads:

> If an action is commenced in due time and in good faith in any court of this state and the defendants or any of them make defense, and it is adjudged that the court has no jurisdiction of the action, the plaintiff or his representative may, within ninety days from the time of that judgment, commence a new action in the proper court. The time between the commencement of the first and last action shall not be counted in applying any Statute of Limitations.

Following the familiar rule that statutes *in pari materia* must be constructed together, it appears that the net effect of the foregoing statutes is that an action for personal injuries accruing in Kentucky is barred by limitations unless process is issued in good faith from the court having jurisdiction of the action within one year from the accrual of the cause of action except that if such process is timely issued in good faith by a "court of this state", which later is determined to be without jurisdiction, and if the plaintiff causes process to be issued in good faith from the proper court within ninety days from such determination, the action is not barred until the expiration of one year plus the period of time between the issuance of process from the respective courts. The Kentucky Court of Appeals has expressly held that a United States District Court "in Kentucky" is a "court of this state" within the meaning of KRS 413.270 (1).

In the opinion of the Court, however, the Kentucky Court of Appeals would obviously not construe "a court of this state" to include a United States Court sitting in Michigan, and, thus, if the plaintiffs' claim is not barred by limitation, it must be because of the sufficiency of the commencement of this action in the Michigan Court. Under the express provisions of K.R.S. 413.250, such commencement could be deemed sufficient only if the Michigan court could be said to have "jurisdiction of the cause of action".

The general rule, which has been followed by the Kentucky courts in cases such as *Covington Trust Company of Covington* v. *Owens,* 278 Ky. 695, 129 S.W.2d 186 (1939), is that jurisdiction of a cause of action requires jurisdiction of the subject matter and jurisdiction of the parties who might later complain of a judgment rendered in the action. The plaintiffs have offered no theory as to how the Michigan court could have acquired jurisdiction of the person

of the defendant, and the Court is aware of none. It is therefore manifest that the Michigan Court is not a court "having jurisdiction of the cause of action" such that the issuance of process from it would have made the action timely under Kentucky law.

The first process issued from a court having jurisdiction of the action was the process of this Court issued on August 3, 1971. In view of that fact and in view of the fact that the plaintiffs had caused no process to be issued by any court in Kentucky within one year from the accrual of their cause of action, Kentucky law dictates that the action is barred by limitations.

The Court is aware that this conclusion is inconsonant with certain *dicta* in *Carson* v. *U-Haul Co.*, 434 F.2d 916 (6th Cir. 1970). In that case the plaintiff brought suit in a federal court in Georgia seeking recovery from Kentucky defendants as a result of an accident which occurred in Georgia. The action was brought some 23 months after the accident occurred. The appellate court held that upon the transfer of the action to this district, which was necessary if jurisdiction was to be had of the person of some of the defendants, Kentucky limitation law applied to the case and the action was, therefore, untimely. The court remarked that had the action been commenced in Georgia within one year of the accrual of the cause, such commencement would have been sufficient to make the action timely. This remark was made without reference, however, to the peculiar definition of the commencement of an action statutorily embodied in Kentucky's limitations laws.

The federal statute providing for the transfer of an action from a court lacking jurisdiction, 28 U.S.C. 1406 (a), and the landmark case interpreting same, *Goldlawr, Inc.* v. *Heiman*, 369 U.S. 463 (1962), purport only to eliminate a procedural element which might kill an action

which was otherwise viable within the meaning of the relevant statute of limitations. Neither the statute nor *Goldlawr,* however, purport to engraft a federal definition of the commencement of an action onto state limitation laws, thereby breathing life into actions which were never timely under state law. Stated in terms of this case, if the commencement of the action in the Michigan Court had been sufficient under Kentucky limitations law, the transfer of the action would have kept the cause of action alive, free of the limitations defense which would inhere in dismissal and refiling. The transfer could not, however, make sufficient the original commencement of the action for the purpose of the limitations question if the original commencement was insufficient under Kentucky law. The Court is convinced, for the reasons stated hereinabove, that this action was never sufficiently commenced to bar the defense of limitations.

For all of the foregoing reasons the defendants motions to Quash the service of process from the United States District Court for the Eastern District of Michigan and to dismiss this action should be sustained. Upon the sustaining of said motions, the defendant's motion to quash the service of process of this Court will be rendered moot, and the same should therefore be overruled.

An Order in conformity herewith will be this day entered.

This 24th day of May, 1972.

/s/ BERNARD T. MOYNAHAN, JR.
Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON

NO. 1986

LEWIS V. SMITH, ET AL,

Plaintiffs,

vs.

ELIZABETH ANN PETERS,

Defendant.

ORDER

(Filed May 24, 1972)

In conformity with the Memorandum Opinion this date entered herein, IT IS ORDERED AND ADJUDGED HEREIN AS FOLLOWS:

(1) The motion to Quash the service of process from the United States District Court for the Eastern District of Michigan and the Motion to Dismiss is hereby sustained, and this cause is hereby dismissed.

(2) In view of the Court's ruling in numerical paragraph (1) hereof, the Motion to quash service of this Court is moot and same is overruled.

(3) That this cause be and the same is hereby stricken from the docket.

This the 24th day of May, 1972.

/s/ BERNARD T. MOYNAHAN, JR.
Judge

Notice is hereby given of the Entry of this Order or Judgment on May 30, 1972.

DAVIS T. McGARVEY, Clerk
By: /s/ SHIRLEY E. MILLS
D.C.

No. 72-1746

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

LEWIS V. SMITH and CLEO SMITH,
Plaintiffs-Appellants,

v.

ELIZABETH ANN PETERS,
Defendant-Appellee.

APPEAL from United States District Court for the Eastern District of Kentucky.

Decided and Filed August 7, 1973.

Before WEICK, EDWARDS and MCCREE, Circuit Judges.

WEICK, Circuit Judge. This appeal presents the question whether federal courts are required to apply the Federal Rule of Civil Procedure (Rule 3) or a state statute which conflicts therewith, to determine the issue as to when an action is commenced in the federal courts.

The question arose in an action for damages in excess of $10,000, for personal injuries resulting from an automobile accident which occurred in Kentucky on May 3, 1970. The action was filed on April 23, 1971, by the plaintiffs against the defendant, in the United States District Court for the Eastern District of Michigan. Plaintiffs were residents of Michigan; the defendant was a resident of Kentucky; and jurisdiction was based on diversity of citizenship. Summons on the complaint was issued and served

on the defendant by the United States Marshal in Kentucky, on April 28, 1971.

Defendant filed a motion to dismiss for lack of jurisdiction since she had been served in Kentucky, rather than in Michigan. Plaintiffs then filed a motion to transfer the case to the Eastern District of Kentucky (where defendant resided), which motion was granted by the Court as being "in the interest of justice," as provided by 28 U.S.C. § 1404 (a). After the transfer, plaintiffs caused another summons to issue on August 3, 1971, which summons was served on the defendant on August 10, 1971.

Defendant, after the transfer, renewed her motion to dismiss the action and filed motions to quash the Marshal's return of service issued by the District Court in Michigan, and also in Kentucky. The District Court granted the motion to dismiss, holding that Kentucky's one-year statute of limitations was a bar, and that the timely filing of the action in the District Court in Michigan did not toll the operation of the Kentucky statute of limitations.

It was the view of the District Court that Rule 3 of the Federal Rules of Civil Procedure, which provides:

> "A civil action is commenced by filing a complaint with the Court,"

was not controlling over Kentucky's statute with respect to the time of commencement of an action. The Kentucky statute provided:

> "An action shall be deemed to commence on the date of the first summons or process issued in good faith from the Court having jurisdiction of the cause of action." (KRS 413.250)

A saving clause is provided in KRS 413.270 (1), as follows:

> "If an action is commenced in due time and in good faith in any court of this state and the defendants or any of them make defense, and it is adjudged that the court has no jurisdiction of the action, the plaintiff or his representative may, within ninety days from the time of that judgment, commence a new action in the proper court. The time between the commencement of the first and last action shall not be counted in applying any statute of limitation."

The District Court was of the view that the decision of the Supreme Court in *Erie R.R.* v. *Tompkins,* 304 U.S. 64 (1938), required the Court to decide all "outcome determinative questions" according to state law, and it held that Rule 3 of Federal Rules of Civil Procedure, which conflicts with KRS 413.250, was not controlling. The effect of the District Court's holding was to render inapplicable Rule 3. We reverse.

The complaint was timely filed in the United States District Court for the Eastern District of Michigan, within the one-year period required by the Kentucky statute of limitations, and defendant was served in Kentucky within that period, although such service was not authorized. The Michigan statute of limitations was three years. M.S.A. 27 A 5805. Thus plaintiffs' complaint was timely filed under the laws of both Michigan and Kentucky.

In our opinion, the District Court erred in holding that the manner of commencement of an action in the federal courts is an "outcome determinative question" which a federal court, under *Erie R.R.* v. *Tompkins, supra,* is required to determine under state, rather than federal law. In our view the decision as to when the action was commenced determines only whether the action is to continue; it is purely procedural, and does not relate to the substantive issues of the case.

This question, however, was set to rest by the Supreme Court in *Hanna* v. *Plumer,* 380 U.S. 460 (1965), which case was not considered by the District Judge in his Memorandum Opinion. *Hanna,* like the present case, was a diversity action for damages in excess of $10,000, for personal injuries, the action having been filed in the federal court against an executor of an estate. Rule 4 (d) (1) of the Federal Rules of Civil Procedure required service of process to be made on the defendant personally, or by leaving copies at his dwelling house with some person of suitable age and discretion, residing therein. The summons was left with defendant's wife at his residence, concededly in compliance with Rule 4 (d) (1). The service, however, did not comply with a Massachusetts statute which required summons to be served personally on the defendant in an action against an executor or administrator. The defendant filed a motion to dismiss on the ground that Massachusetts' one-year statute of limitations barred the action since the defendant had never been served as required by the Massachusetts statute. The District Court, relying on *Ragan* v. *Merchants Transfer & Whse. Co.,* 337 U.S. 530 (1949), and *Guaranty Trust Co.* v. *York,* 326 U.S. 99 (1945), dismissed the action. The Court of Appeals affirmed. The Supreme Court, in a unanimous decision, reversed, holding that Rule 4 (d) (1) was "designed to control service of process in diversity actions . . .," and it was a valid rule. (380 U.S. at 463).

The Court said:

> "In the first place, it is doubtful that, even if there were no Federal Rule making it clear that in-hand service is not required in diversity actions, the *Erie* rule would have obligated the District Court to follow the Massachusetts procedure. 'Outcome-determination' analysis was never intended to serve as a talisman.

Byrd v. *Blue Ridge Cooperative,* 356 U. S. 525, 537. Indeed, the message of *York* itself is that choices between state and federal law are to be made not by application of any automatic 'litmus paper' criterion, but rather by reference to the policies underlying the *Erie* rule. *Guaranty Trust Co.* v. *York, supra,* at 108-112." (*Id.* at 466, 467).

The Court further said:

"The difference between the conclusion that the Massachusetts rule is applicable, and the conclusion that it is not, is of course at this point 'outcome-determinative' in the sense that if we hold the state rule to apply, respondent prevails, whereas if he hold that Rule 4 (d) (1) governs, the litigation will continue. But in this sense *every* procedural variation is 'outcome-determinative.' For example, having brought suit in a federal court, a plaintiff cannot then insist on the right to file subsequent pleadings in accord with the time limits applicable in the state courts, even though enforcement of the federal timetable will, if he continues to insist that he must meet only the state time limit, result in determination of the controversy against him. So it is here. Though choice of the federal or state rule will at this point have a marked effect upon the outcome of the litigation, the difference between the two rules would be of scant, if any, relevance to the choice of a forum. Petitioner, in choosing her forum, was not presented with a situation where application of the state rule would wholly bar recovery; rather, adherence to the state rule would have resulted only in altering the way in which process was served. Moreover, it is difficult to argue that permitting service of defendant's wife to take the place of inhand service of defendant himself alters the mode of enforcement of state-created rights in a fashion sufficiently 'substantial' to raise the sort of equal protection problems to which the *Erie* opinion alluded." (380 U.S. at 468, 469).

The Court further said:

> "There is, however, a more fundamental flaw in respondent's syllogism: the incorrect assumption that the rule of *Erie R. Co.* v. *Tompkins* constitutes the appropriate test of the validity and therefore the applicability of a Federal Rule of Civil Procedure. The *Erie* rule has never been invoked to *void* a Federal Rule. It is true that there have been cases where this Court has held applicable a state rule in the face of an argument that the situation was governed by one of the Federal Rules. But the holding of each such case was not that *Erie* commanded displacement of a Federal Rule by an inconsistent state rule, but rather that the scope of the Federal Rule was not as broad as the losing party urged, and therefore, there being no Federal Rule which covered the point in dispute, *Erie* commanded the enforcement of state law." (Emphasis added.) (380 U.S. at 469-470).

Like the Massachusetts statute in *Hanna*, the Kentucky statute, KRS 413.250, clashes with Rule 3. In closing, the Court in *Hanna* said:

> "To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act. Rule 4 (d) (1) is valid and controls the instant case." (*Id.* at 473-474).

The decision in *Hanna* is somewhat in conflict with the Court's decision in *Ragan* v. *Merchants Transfer & Whse. Co.*, 337 U.S. 530 (1949). However, Mr. Justice Harlan, in his concurring opinion, in referring to *Ragan*, stated with characteristic simplicity: "I think that the decision was wrong." 380 U.S. at 477.

The fact that the District Court in Michigan had no personal jurisdiction over the defendant does not militate against its right to transfer the case. As well stated by Mr. Justice Black, who wrote the opinion for the Court in *Goldlawr, Inc.* v. *Heiman,* 369 U.S. 463 (1962):

> "Section 1406(a), under which the Pennsylvania District Court transferred this case, provides:
>
> > 'The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.'
>
> Nothing in that language indicates that the operation of the section was intended to be limited to actions in which the transferring court has personal jurisdiction over the defendants. And we cannot agree that such a restrictive interpretation can be supported by its legislative history — either that relied upon by the Court of Appeals or any other that has been brought to our attention. The problem which gave rise to the enactment of the section was that of avoiding the injustice which had often resulted to plaintiffs from dismissal of their actions merely because they had made an erroneous guess with regard to the existence of some elusive fact of the kind upon which venue provisions often turn. Indeed, this case is itself a typical example of the problem sought to be avoided, for dismissal here would have resulted in plaintiff's losing a substantial part of its cause of action under the statute of limitations merely because it made a mistake in thinking that the respondent corporations could be 'found' or that they 'transact . . . business' in the Eastern District of Pennsylvania. The language and history of § 1406(a), both as originally enacted and as amended in 1949, show a congressional purpose to provide as effective a remedy as possible to avoid precisely this sort of injustice.

"The language of § 1406 (a) is amply broad enough to authorize the transfer of cases, however wrong the plaintiff may have been in filing his case as to venue, whether the court in which it was filed had personal jurisdiction over the defendants or not. The section is thus in accord with the general purpose which has prompted many of the procedural changes of the past few years — that of removing whatever obstacles may impede an expeditious and orderly adjudication of cases and controversies on their merits. When a lawsuit is filed, that filing shows a desire on the part of the plaintiff to begin his case and thereby toll whatever statutes of limitation would otherwise apply. The filing itself shows the proper diligence on the part of the plaintiff which such statutes of limitation were intended to insure. If by reason of the uncertainties of proper venue a mistake is made, Congress, by the enactment of § 1406 (a), recognized that 'the interest of justice' may require that the complaint not be dismissed but rather that it be transferred in order that the plaintiff not be penalized by what the late Judge Parker aptly characterized as 'time-consuming and justice-defeating technicalities.' It would at least partially frustrate this enlightened congressional objective to import ambiguities into § 1406 (a) which do not exist in the language Congress used to achieve the procedural reform it desired." (369 U.S. at 465-467).

We followed *Goldlawr* in *Taylor* v. *Love,* 415 F.2d 1118 (6th Cir. 1969); *cf., Carson* v. *U-Haul Co.,* 434 F.2d 916 (6th Cir. 1970).

In *Mohler* v. *Miller,* 235 F.2d 153 (6th Cir. 1956), Chief Judge Simons, writing for the Court, stated:

"This does not, however, answer the question as to when the appellant's action was begun. In a well considered opinion in Isaacks v. Jeffers, supra, it was held that where a complaint was filed in the Federal District Court before the expiration of the statute of

> limitations, the action was commenced and the running of the statute was interrupted by the filing of such complaint although process was not actually served until more than 60 days after the expiration of the limitation period. While state law controls the time within which an action must be begun, the manner in which an action is commenced and when it is deemed to have begun, are governed by the law of the forum. These matters are procedural and not substantive. This reasoning was approved and followed by Judge Learned Hand in Bomar v. Keyes, supra [162 F.2d 140]. wherein it was explicitly held: 'However, we now hold that it is the filing of the complaint which tolls the statute. We think that Rules 3 and 4 (a) of the Rules of Civil Procedure, 28 U.S. C.A. * * * have made no longer applicable § 17 of the New York Civil Practice Act, which fixes the beginning of the action at the date when the writ is served, or is put into the sheriff's hands for service.' " (*Id.* at 155).

He further stated:

> "Nor is this a case where 'limitation is annexed as a condition to the very right of action created. The Civil Rights Act is not cast in that form; and when a right is not so conditioned, the statute of limitations is treated as going to the remedy.' Bomar v. Keyes, supra, 162 F.2d at page 140. There is no such condition in the Michigan statute." (*Id.* at 155-156).

The judgment of the District Court is reversed, and the cause is remanded for trial.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 72-1746

LEWIS V. SMITH and CLEO SMITH,
Plaintiffs-Appellants,

vs.

ELIZABETH ANN PETERS,
Defendant-Appellee.

ORDER ON PETITION FOR REHEARING

(Filed September 5, 1973)

Before WEICK, EDWARDS and McCREE, Circuit Judges.

Ragan v. *Merchants Transfer & Whse. Co.*, 337 U.S. 530 (1949) may be distinguished from our case. In *Ragan*, on page 532 the Court said:

> "It is concered that if the present case were in a Kansas Court it would be barred. The theory of *Guaranty Trust Co.* v. *York* would therefore seem to bar it in the federal court, as the Court of Appeals held."

In *Hanna* v. *Plumer*, 380 U.S. 460 (1965), the Court. in referring to the plaintiff in that case, said:

> "Petitioner, in choosing her forum, was not presented with a situation where application of the state rule would wholly bar recovery;[10] . . . ." (*Id.* at 469)

Footnote 10 cited *Ragan,* containing the above quotation.

In our case, contrary to *Ragan,* there was no concession that if the case had been filed in a Kentucky court it would have been barred. As a matter of fact if it had been filed in a Kentucky court it would not have been barred because the action in the District Court not only was filed within the Kentucky one-year statute of limitation period, but summons was served on the defendant within that period, although such service was not authorized.

Appellee relies on *Sylvester* v. *Messler,* 246 F.Supp. 1 (E.D.Mich., 1964), *aff'd per curiam,* 351 F.2d 472 (6th Cir. 1965), *cert. denied,* 382 U.S. 1011, where the plaintiff failed to comply with the time and service requirements of the Michigan three-year statute of limitations.

The complaint was filed three days before the statute of limitations ran, but the summons and complaint were not placed in the hands of the Marshal until about one month later. Plaintiffs' attorney had attempted to serve the papers himself, without first having obtained a special appointment for that purpose as required by Rule 4 (c) Fed.R.Civil P.

In following *Ragan,* we were impressed by the fact that the Supreme Court in *Hanna* v. *Plumer* carefully refrained from overruling *Ragan.* The panel did not discuss the distinction which we pointed out above, as it did not exist in that case.

In *Groninger* v. *Davison,* 364 F.2d 638 (8th Cir. 1966), the Court also found it difficult to reconcile *Hanna* with *Ragan,* but because the Supreme Court did not expressly overrule *Ragan* the Court concluded that it was obligated to follow *Ragan.* The Court cited *Sylvester* v. *Messler, supra.*

We followed *Hanna* v. *Plumer, supra,* which was decided subsequent to *Ragan*. We also experienced difficulty in reconciling the two cases. In any event, *Ragan* is distinguishable from our case. To the extent that our decision conflicts with *Sylvester* v. *Messler, supra,* we decline to follow it.

In our opinion Rule 3 of the Federal Rules of Civil Procedure, and not a state statute, governs as to the commencement of actions in federal courts.

The petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT.

/s/ JAMES A HIGGINS
Clerk

PROOF OF SERVICE

I, Boyd F. Taylor, attorney for the Petitioner herein and a member of the Bar of this Court hereby certify that on this 1st day of ~~Nov~~Dec ember, 1973, three copies of the Petition for Writ of Certiorari was mailed, first class, postage prepaid to Hon. Stephen G. Danko, 12154 Dix-Toledo Road, Southgate, Michigan 48195, counsel for the Respondents. I further certify that all parties required to be served have been served.

Boyd F. Taylor

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